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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BOB LEE, as District Attorney, etc.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA
CRUZ COUNTY,

Respondent.

No. H039380

(Santa Cruz

Super. Ct. Nos. F22191, F22194,
F22196)

The District Attorney of the County of Santa Cruz challenges an order imposing sanctions of \$500 against the District Attorney of Santa Cruz County under Code of Civil Procedure section 177.5. The trial court imposed sanctions because the District Attorney's Office did not timely comply with court-ordered discovery before the preliminary hearings in underlying felony proceedings. For the reasons stated here, we will find that the trial court did not abuse its discretion in imposing the challenged sanctions.

I. TRIAL COURT PROCEEDINGS

In February 2012, the District Attorney's Office filed felony complaints against several individuals (including Desiree Foster, Robert Kahn,¹ and Becky Ann Johnson) arising from the occupation of a vacant building in the City of Santa Cruz in November

¹ We note this name appears both as "Robert Norris Kahn," "Robert Norse," and "Robert Norse Kahn" in the record. Intending no disrespect, we will refer to this defendant as "Kahn" throughout.

and December 2011 in connection with the Occupy Santa Cruz movement. Preliminary hearings were originally set for dates in April 2012.

In April 2012, before his preliminary hearing, Kahn filed a motion to compel discovery under Penal Code section 1054.5. Defense counsel filed a declaration stating that she made a verbal request for discovery of “all reports, photographs, and videos” at Kahn’s arraignment. Counsel attached emails and a letter sent in March and April 2012 reflecting further informal requests for discovery from the District Attorney’s Office.

Later in April 2012, defense counsel informed the court that the prosecutor had not yet disclosed all of the items requested. The court stated its “desire that the defendants have in hand all of the necessary discovery,” continued the preliminary hearings, and set a hearing on the motion to compel.

The court granted the motion to compel discovery on May 18, 2012, finding that there was additional police surveillance video footage in the People’s possession that had not been disclosed to the defendants. The prosecutor conceded that the motion to compel was unopposed and the court set a compliance deadline of May 21, 2012, for the outstanding materials to be delivered.

On May 25, 2012, Kahn once again requested that the preliminary hearing be continued because the prosecutor had not delivered all discovery. The court continued the matter, stating that “there needs to be some compliance” with the order compelling discovery.

After additional continuances, the court held a hearing on August 17, 2012, where counsel for another defendant maintained that the District Attorney’s Office still possessed police video surveillance evidence that had not been disclosed to the defense. The court expressed frustration, stating: “I’m not getting why all of these counsel don’t have the videotape produced by the District Attorney’s office.” The prosecutor responded that she had “produced everything that is in [her office’s] possession.” After reminding the prosecutor that she needed to produce all items requested, even “if it’s not

in your possession [but] it should be in your possession,” the court set a hearing for August 20, 2012, for an order to show cause why all of the cases should not be dismissed with prejudice for the prosecutor’s “failure to provide necessary discovery which is either in their possession or should have been in their possession.” The court admonished the prosecutor that “[i]f there’s videotape depicting the crime that [was] taken by law enforcement and they’ve asked for [it] and you haven’t given [it to] them it’s absolutely inexcusable.”

At the August 20 hearing on the order to show cause, the prosecutor stated that technical problems had prevented the District Attorney’s Office from copying certain DVD’s of police surveillance video and that the office overcame that difficulty by purchasing external hard drives, connecting them directly to computers at the police department, and copying the videos directly to the hard drives for distribution to the defendants. After listening to the prosecutor’s explanation, the court stated: “Here’s the problem. I think we’ve had this case on for confirmation of preliminary examination maybe three times, at least twice, and when we did defense counsel at each occasion made requests for these videos. I ordered [the prosecutor] to provide the videos . . . so that [the defendants] would be prepared to deal with the testimony of the investigating officer to determine whether this video documentation either confirms or contradicts the live testimony of the officers. . . . That’s why I was so frustrated on [August 17, 2012,] that again on the third setting we were dealing with this ongoing problem” After further discussion, the court explained: “The problem is that in prior preliminary examinations [the People] have [not had] the adequate evidence identifying who those individuals are and that’s why this case presents a special problem [and] that is why I issued the order I did concerning discovery so we can weed out the hundreds of people [who] were there” Though the court determined that the prosecutor was not acting in bad faith, it found that “[i]t’s clear she was negligent.” The court continued the

preliminary hearings once again and ordered the parties to brief “whether some form of monetary sanction should be imposed”

On January 8, 2013, the trial court conducted preliminary hearings, ultimately discharging Foster, Kahn, and Johnson. After the preliminary hearings, the court turned to the issue of sanctions. Regarding the parties’ briefing of the sanctions issue, the court noted that the District Attorney’s Office “did not address the . . . fact that I issued a discovery order and that the discovery order was not complied with.” After hearing from the parties, the court imposed a \$500 sanction on the Santa Cruz County District Attorney under Code of Civil Procedure section 177.5.² When asked by the prosecutor how to seek review of the order, the court responded: “They are going to file a writ.” As required by section 177.5, the court filed a written order on January 18, 2013, which summarized the circumstances supporting the sanction. Though the order originally made the deputy district attorney who handled the case jointly and severally liable for the sanction along with the District Attorney’s Office as a whole, the court later removed the individual deputy from the order.

The District Attorney filed a notice of appeal on March 6, 2013, listing “Bob Lee, the District Attorney of Santa Cruz County” as the appellant and “The Superior Court in and for the County of Santa Cruz” as the respondent.

II. DISCUSSION

This case presents the unusual circumstance of a monetary sanction imposed on the District Attorney’s Office related to underlying criminal proceedings. In light of the lack of clear California Supreme Court guidance regarding the appealability of sanction orders imposed in these circumstances, it is not necessary for this court to decide the issue of appealability in this case. We will exercise our discretion and treat the District

² Unspecified statutory references are to the Code of Civil Procedure.

Attorney's appeal as a petition for extraordinary writ. (*Olson v. Cory* (1983) 35 Cal.3d 390, 401.)

1. Standard for Writ of Mandate

"Mandate lies to control judicial discretion when that discretion has been abused." (*State Farm Etc. Ins. Co. v. Superior Court* (1956) 47 Cal.2d 428, 432.) As relevant here, "[a] writ of mandate may be issued . . . to any inferior tribunal . . . to compel the performance of an act which the law specifically enjoins," (§ 1085, subd. (a)), if "there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (§ 1086.) We must therefore determine whether the trial court abused its discretion in imposing a sanction under Code of Civil Procedure section 177.5.

2. Code of Civil Procedure Section 177.5 Sanctions

The trial court sanctioned the District Attorney's Office \$500 for not complying timely with its May 2012 order to provide the underlying defendants with discovery before their preliminary hearings. Section 177.5 states: "A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars (\$1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification." When sanctions are imposed sua sponte, a trial court must first give "notice and opportunity to be heard" and the "order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order." (§ 177.5.)

a. The District Attorney Did Not Timely Comply with a Lawful Court Order

As the District Attorney correctly notes, in 1990 California voters approved Proposition 115, which added Chapter 10 to Title Six of Part Two of the Penal Code (Pen. Code, § 1054 et seq.) (Chapter 10), governing discovery in criminal cases. (*People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 425.) Discovery in

criminal cases is now allowed only to the extent authorized by Chapter 10, “other express statutory provisions, or as mandated by the Constitution of the United States.” (Pen. Code, § 1054.5, subd. (e).)

In his motion to compel discovery, Kahn requested, among other things, “[a]ll video footage and all photographs” created by the police related to the occupation of the vacant building in November and December 2011. Kahn argued he was entitled to this evidence under Penal Code section 1054.1, which requires the People to disclose “[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged,” as well as “[a]ny exculpatory evidence.” (Pen. Code, § 1054.1, subds. (c), (e).) Kahn’s motion to compel discovery was authorized by Penal Code section 1054.5, subdivision (b), which allows a party to seek a court order after the opposing party fails to provide materials in response to an informal request for discovery. “[A] court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order.” (Pen. Code, § 1054, subd. (b).)

Regarding the trial court’s power to order discovery before a preliminary hearing, our opinion in *People v. Magallan* (2011) 192 Cal.App.4th 1444 (*Magallan*) is instructive. There, the defendant requested discovery to assist with a motion to suppress evidence, which was to be heard at the same time as his preliminary examination. (*Id.* at p. 1456.) The People claimed that the criminal discovery provisions in Chapter 10 were inapplicable before a preliminary hearing because Chapter 10 generally sets deadlines in relation to a trial date, which, by the People’s construction, suggested that the right to discovery only attached later in the proceedings. (*Id.* at p. 1460.) We disagreed, noting that Chapter 10 “does not preclude a defendant from making an earlier discovery motion under Penal Code section 1054.5, nor does it preclude such a motion from being granted more than 30 days in advance of trial.” (*Ibid.*)

Here, Kahn made informal requests for discovery falling within the categories in Penal Code section 1054.1 and then filed a motion to compel under section 1054.5 when he did not receive everything he requested. The trial court exercised its authority under Penal Code section 1054.5, subdivision (b) to order immediate disclosure. The court explained that “this case presents a special problem” because there were “hundreds of people” involved in the Occupy march, and “in prior preliminary examinations [the People] have [not had] the adequate evidence identifying” the individuals responsible for the vandalism. Additionally, “[i]t is well established, in California and elsewhere, that a court has both the inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it, and that one important element of a court’s inherent judicial authority in this regard is ‘the power . . . to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. . . .’ [Citation.]” (*People v. Engram* (2010) 50 Cal.4th 1131, 1146.) Further, “courts may adopt their own rules of procedure so long as those rules are not inconsistent with due process, statutes, or statewide rules of court.” (*People v. Ward* (2009) 173 Cal.App.4th 1518, 1528.)

The trial court articulated a specific reason for ordering discovery before a preliminary hearing in this particular case, and nothing in Chapter 10 precluded the court from making that order. We therefore find, for purposes of the sanctions at issue here, that the order compelling discovery was a lawful exercise of the court’s inherent authority to control its proceedings. (*Engram, supra*, at p. 1146; *Ward, supra*, at p. 1528.)

Having determined that the underlying order was lawful, we do not reach the District Attorney’s broader arguments relating to the timing and extent of a criminal defendant’s entitlement to discovery. Nor do we decide whether the reasoning of *Magallan* extends to all cases where a defendant requests discovery before a preliminary hearing. Further, the District Attorney’s complaint that the order compelling discovery

was overbroad is unpersuasive given the prosecutor's agreement to produce discovery under that very order.

b. Violation of the Order was Unjustified

At the August 20, 2012 hearing where the court considered whether to impose sanctions, it explained its frustration regarding the prosecutor's failure to comply with the discovery order. Though the court concluded the prosecutor had not acted in bad faith, the court found it "clear she was negligent." In the sanctions order, the court specifically found that the prosecutor "acted negligently in failing to retrieve and produce the videos as directed, that there was no good cause for the violations and her failure to comply as directed was without substantial justification."

The District Attorney concedes his office did not timely comply with the discovery order, as he must, because disclosure of all videos did not occur until August 2012, three months after the May 2012 deadline for production. Instead, the District Attorney argues that the noncompliance was justified by the "unforeseen" and "unusual technical difficulties" encountered in copying the surveillance video. The District Attorney also argues that various factual misstatements in the trial court's sanction order demonstrate that the court abused its discretion.

Although the sanction order misstates certain aspects of the procedural history of the case, we find none of the misstatements to be material. For example, the order states that the court granted the motion to compel sanctions in April 2012 when the court actually granted the order at a May 2012 hearing. Though the court did not yet make the order compelling discovery at the April 2012 hearing, it did express at that hearing its "desire that the defendants have in hand all of the necessary discovery" before the preliminary hearing. The court made clear at multiple hearings both before and after granting the motion to compel that it expected the prosecutor to provide the discovery Kahn requested and the prosecutor agreed to do so. While we recognize that "technological difficulties" described by the prosecutor may cause some delay in

producing digital materials, we find no abuse of discretion in the trial court's determinations that the prosecutor's three-month delay was "without substantial justification" and "caused substantial disruption to the scheduling and conduct of business of the court resulting in wasted judicial resources and inconvenience to the parties, counsel and the community."

c. The Court Provided Notice and an Opportunity to be Heard

The District Attorney argues the trial court gave an inadequate opportunity to be heard because the court did not allow the prosecutor to contest the lawfulness of the discovery order. As the court noted in *Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075 (*Seykora*), however, "the reason for the notice requirement [in § 177.5] is to advise the responding party that the imposition of sanctions is being considered, and to give the party an opportunity [to] prepare for the hearing." (*Id.* at p. 1081.) As for the opportunity to be heard, section 177.5 does not mandate a full evidentiary hearing. To the contrary, " 'the scope of a hearing on an application for sanctions is within the trial court's discretion, . . . ' [Citation.]" (*Id.* at p. 1082, italics omitted.)

The District Attorney urges us to follow *People v. Hundal* (2008) 168 Cal.App.4th 965, 970, which adopted the following reasoning from Justice Grignon's dissent in *Seykora*: "Due process, as well as the statute itself, requires that a person against whom Code of Civil Procedure section 177.5 sanctions may be imposed be given adequate notice that such sanctions are being considered, notice as to what act or omission of the individual is the basis for the proposed sanctions, and an objective hearing at which the person is permitted to address the lawfulness of the order, the existence of the violation, and the absence of good cause or substantial justification for the violation."³ (*Seykora*, *supra*, 232 Cal.App.3d at p. 1088 (dis. opn. of Grignon, J.).)

³ We note that the District Attorney's brief fails to disclose that his citation to *Seykora* is from a dissenting opinion.

Review of the record shows that the notice and hearing provided to the prosecutor was adequate. At the end of the August 20, 2012 hearing, the court stated it would entertain briefing regarding whether a sanction (including a monetary sanction) was appropriate for the prosecutor's violation of the discovery order. At that hearing, one of the prosecutors stated "if you have some sanction in mind [can you] consider sanctioning . . . the [District Attorney's] office as opposed to dismissing the case" Several months later, at a January 4, 2013 hearing confirming the scheduled preliminary examinations, the court noted that no briefs had been filed on the sanctions issue and provided another opportunity to submit briefing. The District Attorney's Office responded with a four-page document entitled "Points and Authorities Regarding Sanctions," wherein they focused exclusively on the lawfulness of the order granting Kahn's motion to compel. At the end of the preliminary examinations on January 8, 2013, the court discussed the sanctions issue, stated it intended to impose sanctions of \$500 against the District Attorney's Office, and heard from counsel for each party. The court entered a written order sanctioning the District Attorney's Office on January 18, 2013. The trial court afforded the District Attorney ample opportunity to oppose the sanction.

III. DISPOSITION

The petition is denied.

Grover, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Márquez, J.